No. 89-278

In The

Supreme Court of the United States

October Term, 1989

DAVID FOSTER KENNISON, WILLIAM ROBERT BLACK,

Petitioners,

v.

BETI OWENS HOLCOMBE,

Respondent.

**On Petition For Writ Of Certiorari To
The Court Of Appeals
For The State Of South Carolina**

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

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STATEMENT OF THE CASE

In this child custody case, the mother of a fourteen-year-old child brought an action for a writ of habeas corpus in the Family Court in Columbia, South Carolina, alleging her abduction by the Petitioners.

The Petitioners had earlier agreed to cooperate with the Family Court in an action which had been initiated by the Richland County Department of Social Services and

were placed under an order to do so. Transcript of Record (hereinafter "Tr.") at 9. Thereafter, the mother brought an action of her own seeking, *inter alia*, a writ of habeas corpus, directed to the Petitioners to return her child. Tr. at 21. The Family Court issued the Writ of Habeas Corpus requiring the child's return by the Petitioners and their confederates at 3:00 o'clock p.m., November 5, 1986. Tr. at 13.

The Family Court convened a hearing at the appointed date and time. The Petitioners were represented by counsel and appeared with their counsel at those proceedings.

At those proceedings, their counsel handed up correspondence addressed to the Court, and signed by their counsel, which read as follows:

> During last night I received a telephone call from my client, Mrs. Black, the wife of David Kennison and the de facto mother of Sasha.
>
> She called me again this morning at my office, wanting me to convey to David and Bob Black a signal (at the call back) as to whether or not she should bring Sasha to Columbia for the hearings scheduled for today at 3:00 P.M. I advised Mrs. Black that Sasha was represented by Jack Swerling who is the best criminal lawyer I know and she should follow his advice regardless and her husband wanted her and the child back in the jurisdiction due to promises we had made with the Court which should be kept at all costs and furthermore that advised Mr. Black and Mr. Kennison to bring them back if possible for their own good because once safely returned to the jurisdiction we might expect a reconsideration of the bond denial, however, Black and David are now opposed to them returning because he

> (sic) is being forced daily to shave with the same blades (with cold water) the other prisoners are using and one of them has AIDS. This exchange of nicks and blood has caused them great anguish and concern . . . Tr. at 60A.

As the record demonstrates, the Family Court held the Petitioners in contempt for their failure to produce the child and sentenced them to one year in jail and fining each of them $1,500.00. However, the Family Court also allowed the Petitioners to purge themselves of contempt by giving them five additional days to return the child. Tr. at 61.

From the Order, the Petitioners appealed on various grounds to the Supreme Court of South Carolina. They raised for the first time their claim to a right to a jury trial in one sentence in their 89-page brief in September, 1987, almost a year after the hearing (Appellants' brief at 78). The South Carolina Court of Appeals entertained the Petitioners' claims after the Supreme Court transferred jurisdiction to the Court of Appeals. On December 1, 1988, the Court of Appeals affirmed the criminal contempt convictions in a Memorandum Order contained in the Petitioners' Appendix. After the Petitioners unsuccessfully sought a writ of certiorari in the State Supreme Court, they now petition for certiorari here.

REASONS FOR DENYING THE WRIT

The Petition for Writ does not present a substantial federal question under the circumstances of this case.

The Petitioners have correctly cited *Bloom v. Illinois*, 391 U.S. 194 (1968), for the proposition that when the

maximum penalty imposed for criminal contempt is greater than six months, the contemnor is entitled to a jury trial. This was likewise the rationale for the vacation of the sentences by the South Carolina Court of Appeals.

However, whether the contemnors were cited under the statutory authority provided the Family Court for the imposition of the one-year sentence at issue here is subject to doubt. While the Court of Appeals adverted to the statutory authority allowing Family Courts in South Carolina to impose the sanctions of contempt, at App. 3a, this may not be the basis relied upon by the Court of Appeals in characterizing the nature of the contempt and its concomitant sentence as criminal.

To begin with, the South Carolina Court of Appeals, in upholding the authority of the Family Court to punish the Petitioners for their disobedience of the Family Court's writ cited *Curlee v. Howle*, 277 S.C. 377, 280 S.E.2d 915 (1982) in support of the Family Court's imposition of sanctions. In that case, which also involved child abduction by a parent, the South Carolina Supreme Court established that the Family Courts, like all courts, possessed the inherent power to punish contemnors.

> [That power] is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and *writs*, (emphasis added) of the courts and consequently to the due administration of justice.

Id., 287 S.E.2d 915, 917. While not critical to this Court's decision, there may be some question under South Carolina law as to whether the statutory authorization of a

one-year sentence and a $1,500.00 fine is a limitation on the civil contempt powers of the Family Court.

Moreover, in another case involving the correction of a contempt sentence by a Family Court, the State Supreme Court has upheld a contempt conviction under the same rationale while correcting a misapplied statutory sentence for a juvenile. *In The Interest of Darlene C.*, 278 S.C. 664, 301 S.E.2d 136 (1983) addressed the imposition of an indeterminate sentence imposed on a juvenile for contempt. The State Supreme Court upheld the conviction of a juvenile for criminal contempt adverting to the inherent power of the Family Court to punish contemnors. In so holding, the State Supreme Court nevertheless corrected the original sentence, which was an indeterminate sentence imposed by the Family Court pursuant to statutory provisions of the South Carolina Children's Code regarding the sentencing of juveniles, by remand to the trial court for the imposition of a sentence not to exceed six months.

Even if the original sentence here had been imposed by the Family Court pursuant to its statutory authority, and not its inherent authority, the remedy fashioned by the Court of Appeals ought to be sufficient under the facts of this case.

To begin with, as *Bloom v. Illinois* points out, the rationale for the guarantee of a right to a jury trial in criminal contempt cases where the punishment may exceed a term of six months is to avoid the arbitrary exercise of official power. *Bloom*, 391 U.S. at 202. The record clearly established to the satisfaction of the South

Carolina Court of Appeals that the Petitioners' noncompliance with the previous orders of the Family Court was willful. The Petitioners made no effort at the hearing before the Family Court, November 5, 1986, to mitigate their lack of cooperation to any degree. It is therefore unlikely that their conviction was the result of an arbitrary or capricious act by the state trial court.

In the face of the maximum statutory sanction of one year, the Petitioners challenge the remedy which was fashioned by the Court of Appeals limiting any sentence to be imposed to one six months or less.

There is ample state decisional law upholding such a result. While the Petitioners contend that the case cited by the Court of Appeals as directing the appropriate remedy, *State v. Petty*, 245 S.C. 40, 138 S.E.2d 633 (1965), involved an appellate challenge to an illegal sentence but not the fact of the appellant's conviction, *State v. Petty* itself cited another South Carolina case, *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), for the "well settled practice" in South Carolina to affirm the conviction and set aside the sentence. In *State v. Gregory*, the criminal defendant there appealed both the fact his conviction as well as the sentence, the latter which was held to be excessive.

Taylor v. Hayes, 418 U.S. 488 (1974), does indeed leave open the question whether a state may set aside an invalid sentence for contempt in the face of a criminal contempt statute allowing a longer sentence.

If the Petitioners complain that a state should be prohibited altogether from obviating the right to a jury trial by a curative sentence, the are mistaken.

> It is argued that a state may not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial The thrust of our decisions, however, is to the contrary: In the absence of legislative authorization of serious penalties for contempt, a state may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the state, after conviction, to reduce the sentence to six months or less rather than to re-try the contempt with a jury.

Taylor, 418 U.S. at 496. *Taylor* then cites *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), as authority for such a curative sentence in the federal system.

In *Cheff*, the defendant was convicted of criminal contempt by the Seventh Circuit Court of Appeals for his contempt of that Court's *pendente lite* order requiring compliance with an order of the Federal Trade Commission. In its supervisory capacity, this Court advised the federal courts that sentences in contempt cases in excess of six months in the federal system for criminal contempt could not be imposed by a court absent a jury trial or waiver thereof.

> Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries.

Id., 384 U.S. 380.

It is conceded that if indeed the Petitioners were sentenced under the state's statutory authorization for the imposition of a maximum sentence of one year by the Family Court, and not under its inherent powers, *Taylor*

leaves open the question of the remediation of the sentence or outright reversal as an appropriate remedy. However, the command of the South Carolina Court of Appeals on remand is clear and unequivocal: The Petitioners are not to receive a sentence in excess of six months from the Family Court. There is therefore no possibility they will face a term in excess of sanctions reserved for petty offenses under the previous decisions of this Court. *Cf., Codispoti v. Pennsylvania,* 418 U.S. 506, 512 (1974). Given the clear record of the Petitioners' contumacious conduct before the trial court, and the decided policy of the State of South Carolina to remediate excessive sentences by remand, a policy which is due some deference, the South Carolina Court of Appeals has fashioned a remedy which is wholly adequate to serve the Petitioners.

CONCLUSION

Under the facts of this case, any federal question presented by the Petitioners is insubstantial at best, and the Petition for Writ of Certiorari should therefore be dismissed.

This the 21st of November, 1989.

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